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INTO THE TWILIGHT ZONE: ADMISSIBILITY OF SCIENTIFIC EXPERT TESTIMONY IN MONTANA AFTER DAUBERT

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I. INTRODUCTION

Expert testimony has taken on even greater importance in the courts in recent years. Perhaps on no single subject matter is the task of the trial judge more taxing than the admissibility of expert opinion. It is not unusual for parties litigant to come to Court armed with numerous expert witnesses, prepared to testify on numerous substantive areas. While in most cases the admissibility of a particular expert opinion will turn on one or two essential issues, it often happens the trial judge is called upon to address and resolve a half dozen or more threshold evidentiary issues whenever an expert is called to testify.

The difficult nature of a trial judge's task is exemplified in the admission of expert "scientific" opinion. As stated by the D.C. Circuit Court, somewhere in that "twilight zone" at the cutting edge of technology the "evidential force of a principle must be recognized."[1] Under the *Daubert* test first enunciated by the United States Supreme Court in 1993,[2] and as adopted by the Montana Supreme Court in 1994, the trial judge must apply a discrete two-part, multi-factor test whenever an expert is called to testify regarding "scientific" matters. Despite the apparent uniformity of this rule, the reasoning and analysis of the Montana federal courts appears to be at odds, however subtly, with the interpretation made and conclusions drawn by the Montana Supreme Court. This article explores the divergent application of the *Daubert* test by the Montana State and Federal Courts.

Following a review of the general tests of expert opinion admissibility, and the role of the trial court in resolving such issues, this article discusses the *Daubert* decision. Section three addresses the federal applications of *Daubert*, and section four emphasizes the areas of apparent disagreement in the post-*Daubert* decisions of the Montana state and federal courts. Final-

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1. United States v. Frye, 293 F. 1013, 1014 (D.C. Cir. 1923).
2. *See* Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579 (1993).

ly, a proposal for uniformity follows for the purpose of reducing incentives for forum shopping and inconsistent adjudication in the courts of Montana.

II. SCOPE OF PERMISSIBLE EXPERT OPINION—ROLE OF THE TRIAL JUDGE

In general, expert testimony in the form of an opinion may be allowed "if the specialized knowledge of the expert will assist the trier of fact to understand the evidence or determine a fact in issue."[3] This fundamental principle, long a staple of common law, is carried forward in Rule 702 of the Montana and Federal Rules of Evidence. The Rule provides that a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion.

It is a truism that the trial court has broad discretion to determine whether a witness qualifies as an expert in a particular field, or to limit the scope of expert testimony.[4] Once the trial court has determined that the witness is qualified as an expert, further attacks on the expert's qualifications may affect the weight the jury accords his testimony, but not the admissibility of that testimony.[5] When addressing the admissibility of a

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3. Smith v. Roosevelt County, 242 Mont. 27, 788 P.2d 895 (1990).

4. *See, e.g.,* Schneider v. Minnesota Mutual Life Ins. Co., 247 Mont. 334, 806 P.2d 1032 (1991) (granting wide discretion in determining whether to admit expert testimony); Thomsen v. State of Montana, 253 Mont. 460, 462, 833 P.2d 1076, 1077 (1992)(citing Simpson v. White, 220 Mont. 14, 713 P.2d. 983)(holding that the court may in its discretion limit the scope of expert testimony); *see also* Lindberg v. Leatham Bros., Inc., 215 Mont. 11, 693 P.2d 1234 (1985); State v. Dahms, 252 Mont. 1, 12, 825 P.2d 1214, 1222 (1992) (holding that the determination of the qualification and competency of an expert witness rests largely with the discretion of the trial judge, and without a showing of an abuse of discretion, such determination will not be disturbed); Foreman v. Minnie, 211 Mont. 441, 689 P.2d 1210 (1984) (holding that the abuse of discretion must be plainly and clearly shown); Transcontinental Refrigeration Co. v. Figgins, 179 Mont. 12, 20, 585 P.2d 1301, 306 (1978); Cottrell v. Burlington N. R.R., 261 Mont. 296, 301, 863 P.2d 381, 384 (1993) (quoting Cash v. Otis Elevator Co., 210 Mont. 319, 332, 684 P.2d 1041, 1048 (1984) (holding that the trial court is vested with "great latitude" in ruling on the admissibility of expert testimony).

Where expert testimony is required to prove an essential element, as for example the standard of care in a negligence case, and plaintiff fails to present such expert testimony which establishes the standard of care or breach of that standard, summary judgment may be appropriate. *See* Dalton v. Kalispell Reg'l Hosp., 256 Mont. 243, 846 P.2d 960 (1993) (issuing summary judgment where plaintiff failed to identify expert to testify as to standard of care); Falcon v. Cheung, 257 Mont. 296, 848 P.2d 1050 (1993) (issuing summary judgment where plaintiff did not provide competent expert testimony establishing deviation from standard of care).

5. *See* Wacker v. Park Rural Electric Co-op, Inc., 239 Mont. 500, 501-02, 783

particular expert's testimony, the trial judge may be called upon to assess a number of factors, as explained in the next sections.

A. The Expert's Expertise

The trial court first must determine whether the putative expert has the expertise claimed.[6] "Implicit in Rule 702 is the requirement that before a District Court allows a witness designated as an expert to express an opinion, some foundation must be laid to show that the expert has special training or education and adequate knowledge on which to base an opinion."[7] The party presenting a witness bears the burden of establishing, to the satisfaction of the trial court, that the witness possesses the requisite knowledge, skill, experience, training and education to testify as to the subject in issue.[8] Thus, the expert must be restricted to his or her area of expertise. In one particularly evoca-

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P.2d 360, 361 (1989) (citing State v. Martin, 226 Mont. 463, 466, 736 P.2d 477, 479 (1987)).

6. That an expert acquired his or her expertise in preparation for trial is not a basis for excluding testimony. *See* Price Bldg. Serv., Inc. v. Christensen, 215 Mont 372, 376-77, 697 P.2d 1344, 1347-48 (1985). In Linden v. Huestis, 247 Mont. 383, 807 P.2d 185 (1991) the court held that testimony by a medical expert as to plaintiff's motivation for making complaints of physical pain was not admissible, since the expert was not qualified to testify in that area. While the medical expert was qualified to testify regarding where plaintiff was suffering from an injury, "he was not more qualified than anyone on the jury to speculate about the plaintiff's possible motivation for making complaints which (the expert) felt could not be substantiated by his physical findings." *Id.* at 388, 807 P.2d at 188; *see also* Dahlin v. Holmquist, 235 Mont. 17, 21, 766 P.2d 239, 241 (1988) (quoting Kuiper v. Goodyear Tire & Rubber Co., 207 Mont. 37, 53, 673 P.2d 1208, 1217 (1983) (holding that "secondary gain" testimony excluded as being based on "speculation and guesswork"). One need not have practical experience in a given industry in order to qualify as an expert in litigation involving its products, provided the expert's qualifications are otherwise established. Knudson v. Edgewater Automotive Div., 157 Mont. 400,410-411, 486 P.2d 596, 601 (1971). In *Price Bldg. Serv.*, 697 P.2d 1344 (1985) the court held that expert was competent to express his opinion as to a skill to which he had no practical or personal involvement prior to preparation for trial, where the trial court was presented with sufficient evidence of the expert's competence to justify admission, and questions as to his depth of knowledge affected the weight and reliability of the testimony, not its admissibility. And in *Springer v. Opsahl*, 229 Mont. 10, 21, 744 P.2d 884, 891 (1987) the court held that opinion testimony was properly admitted as to whether plaintiff was employed by partnership or corporation, notwithstanding that witness admitted he knew little about the subject contracts: "Opsahl's testimony that he knew little about Springer's contract and the addendum to the partnership agreement goes to the weight of his testimony and not the admissibility."

7. Cottrell v. Burlington N. R.R. Co., 261 Mont. 296, 863 P.2d 381 (1993).

8. *See* O'Leyar v. Callender, 255 Mont. 277, 280-81, 843 P.2d 304, 306 (1992); *see also* Glover v. Ballhagen, 232 Mont. 427, 450, 756 P.2d 1166, 1168 (1988).

tive case, the Montana Supreme Court held that a medical expert qualified to testify as to the pudendal nerve was not qualified to testify regarding the sphincter muscle, where the expert admitted the latter was outside the scope of his rather unique calling.[9]

B. The Factual Basis

Even assuming the expert is adequately credentialed, the Court must satisfy itself the opinion derives from a sufficient factual basis. Under Rule 705 of disclosure of the underlying facts or data, unless the Court requires otherwise, "it is a matter for the cross-examiner to determine the underlying facts on which the expert bases his opinion and expose the weaknesses if any of the underlying facts for the consideration of the jury."[10] However, there must be some showing that the facts upon which the expert relies are the true facts of the case; opinion testimony will not be permitted where the expert failed to do her factual homework.[11]

C. Relevance of Expert Opinion

The trial court must determine whether the expert testimony will be "helpful" to the trier of fact in resolving an actual issue in controversy. As with any other evidence, there must be a threshold showing that the expert opinion has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[12] Stated negatively, expert testimony will be excluded where the expert opinion is not necessary for the jury to be capable of rendering a verdict.[13]

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9. In *Nelson v. Davis Modern Machinery*, 220 Mont. 347, 351, 715 P.2d 1052, 1052 (1986) the court held that a witness qualified to testify on chemical changes in silage should not have been allowed to give an opinion on protein content of silage for purposes of damages calculations where witness not so qualified.

10. *See* Jim's Excavating Serv., Inc. v. HKM Assocs., 265 Mont. 494, 510, 878 P.2d 248, 257 (1994) (citing Wollaston v. Burlington N., Inc., 188 Mont. 192, 201, 612 P.2d 1277, 1282 (1980)).

11. *See infra* note 151.

12. MONT. R. EVID. 401; *See also Dahlin*, 255 Mont. at 20, 766 P.2d at 241.

13. *See* Hightower v. Alley, 132 Mont. 349, 354, 318 P.2d 243, 246 (1945); Lamb v. Page, 153 Mont. 171, 178, 455 P.2d 337, 341 (1969).

D. Degree of Certainty

The trial court must also be satisfied the expert holds her opinions with the requisite degree of conviction. Although absolute certainty is "rarely possible" and thus is not required,[14] expert opinion based on possibilities or probabilities generally is not sufficient.[15] Thus, for expert testimony to be probative, the expert's opinion must be that something is more likely true than not true.[16]

E. Permissible Subject Matter

Finally, the trial court must determine whether the expert is testifying about the right thing, that is, a subject matter amenable to expert opinion. An appropriate "subject matter" has been characterized as one in which scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.[17] A matter generally qualifies where it is "not within the range of ordinary training or intelligence,"[18] is "too complex to be really grasped by the average mind,"[19] or is sufficiently beyond common experience.[20] As the Montana Supreme Court observed, in matters with respect to which a layman can have no knowledge at all, the court and jury must be dependent on expert evidence.[21] Conversely, where the "subject is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the (expert) witness," then expert testimony invades the province of the jury and is not admissible.[22]

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14. *See* Moffett v. Bozeman Canning Co., 95 Mont. 347, 358, 26 P.2d 973, 977 (1933) (holding that "moral certainty" only is required, "or that degree of proof which produces conviction in the unprejudiced mind.").

15. *See* Farris v. Clark, 158 Mont. 33, 44, 487 P.2d 1307, 1313 (1971).

16. *See* Dallas v. Burlington N., Inc., 212 Mont. 514, 523, 689 P.2d 273, 277 (1984).

17. *See* MONT. R. EVID. 702.

18. Kelly v. John R. Daily Co., 56 Mont. 63, 79, 181 P. 326, 331 (1919).

19. Wibaux Realty Co. v. N. Pac. Ry., 101 Mont. 126, 139, 54 P.2d 1175, 1181 (1935).

20. *See* Wagner v. Cutler, 232 Mont. 332, 757 P.2d 779, 783 (1988) (citing MONT. R. EVID. 702); Vandalia Ranch v. Farmers Union Oil & Supply Co., 221 Mont. 253, 258, 718 P.2d 647, 650 (1986).

21. *See Itell*, 181 Mont. at 207.

22. *See* State of Montana v. Howard, 195 Mont. 400, 637 P.2d 15, 17 (1981); *see also* Demarais v. Johnson, 90 Mont. 366, 371, 3 P.2d 283, 285 (1931).

> The necessity for opinion evidence only exists where the facts in controversy are incapable of being detailed and described so as to give the jury an

III. SCIENTIFIC OPINION TESTIMONY

A. *Admissibility of Scientific Opinion—Frye and Daubert*

Rule 702 expressly authorizes opinion testimony on matters of "scientific knowledge." In the 1923 *Frye v. United States* decision, the D.C. Circuit Court reasoned that opinion evidence is admissible if the scientific principle on which the opinion is based "has gained general acceptance in the particular field in which it belongs."[23] The Montana Supreme Court subsequently joined many federal circuits in adopting the *Frye* test under which expert testimony was not admissible absent a foundational showing that the testimony offered a field of science that had gained "general acceptance" in the scientific community.

The Montana Supreme Court signalled retreat from the *Frye* standard in 1983, in the case of *Barmeyer v. Montana Power Co.*[24] In *Barmeyer*, the court held that "the general acceptance rule is not in conformity with the spirit of the new rules of evidence."[25] As explained by the court, "Unless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead the jury, it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation."[26]

Ten years after *Barmeyer*, the United States Supreme Court sounded the death knell of *Frye* in the federal courts when it decided *Daubert v. Merrell Dow Pharmaceutical, Inc.*[27] In an opinion written by Justice Blackmun, the Court noted that *Frye* predated the Federal Rules of Evidence by one-half of a century,

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> intelligible understanding concerning them; but when the facts are such as can be detailed or described, and the jurors are capable to understand and draw a correct conclusion from them without such opinion evidence, the necessity for it does not exist.

Id.

23. Frye v. United States, 293 F. 1013, 1014 (D. C. Cir. 1923).

24. 202 Mont. 185, 657 P.2d 594 (1983).

25. *Id.* at 193, 657 P.2d at 598 (citing United States v. Baller, 519 F. 2d 463 (4th Cir. 1975)).

26. *Barmeyer*, 202 Mont. at 193-94, 657 P.2d at 598 (quoting *Baller*, 519 F. 2d at 466 (citations omitted)). The *Barmeyer* Court also noted its earlier opinion, *Steward v. Casey*, in which the court stated: "Rule 705, Mont. R. Evid., mandates that the opinion of a qualified expert is admissible, and if opposing counsel believe the opinion is not founded on sufficient data, cross-examination is the shield to guard against unwarranted opinions." *Barmeyer*, 202 Mont. at 185, 657 P.2d at 594, (quoting *Steward*, 182 Mont. 185, 193, 595 P.2d 1176, 1180 (1979).

27. 509 U.S. 579 (1993).

and that "[n]othing in the test of (Rule 702) establishes 'general acceptance' as an absolute prerequisite to admissibility."[28] Given the conspicuous lack of any reference to the *Frye* standard in either the drafting history or the text of Rule 702, the Court reasoned the "austere" *Frye* standard was not "assimilated" in, but rather was "incompatible with" the Rule, and thus "should not be applied in federal trials."[29]

In so ruling, the *Daubert* majority was quick to caution that Rule 702 was not without limits. Rather, "under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[30] In furtherance of the trial judge's "gatekeeping" function, the Supreme Court in *Daubert* announced a new two-part test: "Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."[31]

The Montana Supreme Court was quick to embrace the new *Daubert* test in *Hart-Albin Co. v. McLees, Inc.*[32] Additionally in *State v. Moore*, the Montana Supreme Court favorably referenced *Daubert*, and cited with approval the "non-exhaustive" list of relevant factors identified by the *Daubert* majority.[33] In *Moore*, the court expressly adopted the "*Daubert* standard for the admission of scientific expert testimony."[34] In two subsequent decisions, *State v. Weeks*,[35] and *State v. Cline*,[36] the court identified *Daubert* as setting forth the governing standard for admissibility of expert opinion under Rule 702.

B. Fundamentals of the Daubert Test

As noted above, *Daubert* sets forth a two-part test of admissibility. As evidentiary "gatekeeper,"[37] the trial judge is charged

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28. *Daubert*, 509 U.S. at 588.
29. *Id.* at 589.
30. *Id.* at 589.
31. *Id.* at 592.
32. *See* 264 Mont. 1, 870 P.2d 51 (1994),
33. 269 Mont. 20, 41, 885 P.2d 457, 470-71 (1994) (citing *Daubert*, 509 U.S. at 593-94 (1993)).
34. 269 Mont. at 42, 885 P.2d at 471.
35. 270 Mont 63, 891 P.2d 477 (1995).
36. 275 Mont. 46, 909 P. 2d 1171 (1996).
37. Lust v. Merrell Dow Pharm., 89 F.3d 594, 597 (9th Cir. 1996) (stating that district court judges "continue to act as evidentiary gatekeepers").

with ensuring that "any and all scientific testimony or evidence admitted is not only relevant, but reliable."[38] The two-part *Daubert* test thus obligates the trial judge to "assess whether the reasoning or methodology underlying the testimony is scientifically valid . . . and whether that reasoning or methodology properly can be applied to the facts in issue."[39]

The trial judge's undertaking is governed by Rule 104(a), which authorizes the Court to determine "preliminary questions concerning the qualifications of a person to be a witness or the admissibility of evidence."[40] As characterized by the Ninth Circuit, the charge of the trial judge is "to determine, pursuant to Rule 104(a) and Rule 702, whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact in resolving a fact in issue."[41] In making this preliminary determination, the trial judge is not bound by rules of evidence, excepting those pertaining to privilege.[42] The proponent of the expert testimony bears the burden of proving admissibility by a preponderance of the evidence.[43] In that regard, an opposing party need not point to affirmative evidence "disproving" an expert's methodology in order for the opinion to be deemed inadmissible.[44] The trial court is obligated to make a "preliminary assessment of the "reliability" of expert opinion "even in the absence of an objection."[45] Although challenges to the scientific reliability of expert testimony "should ordinarily be addressed prior to tri-

38. *Daubert*, 509 U.S. at 589.

39. United States v. Jones, 24 F.3d 1177, 1179 (9th Cir. 1994) (citations omitted).

40. FED. R. CIV. P. 104(a); MONT. R. CIV. P. 104(a). As noted by the United States Supreme Court, when scientific testimony is proffered, the court must make a Rule 104(a) determination of admissibility. Under Rule 104(a), the proponent must show by a preponderance of evidence that the expert's testimony is admissible. *See Daubert*, 509 U.S. at 592 n.10 (citing Bourjaily v. United States, 483 U.S. 171, 175-76 (1987)).

41. Hopkins v. Merrell Dow Pharm., 33 F.3d 1116, 1125 (9th Cir. 1994).

42. *See id.*

43. *See Lust*, 89 F.3d at 598.

44. *See* Ambrosini v. Labarmaque, 101 F.3d 129, 138 n.11 (D.C. Cir. 1996).

45. Hoult v. Hoult, 57 F.3d 1, 4 (1st Cir. 1995); *see also* Gruca v. Alpha Therapeutic Corp., 51 F. 3d 638, 643 (7th Cir. 1995) (holding that the trial court erred by declining to rule on defendant's objections to the admissibility of plaintiff's expert witness, instead permitting the witness to testify, then directing verdict for the defendant, and stating that "[t]he district court abdicated its responsibility under Rule 104(a) by failing to conduct a preliminary assessment of the admissibility of the plaintiffs expert testimony . . . before permitting the plaintiff's expert to testify."). *But see* Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1066-67 (9th Cir. 1996) (holding that a *Daubert* challenge to admissibility was waived where the opposing party failed "to request a ruling on the admissibility of the evidence in the district court").

al,"[46] a formal hearing is not necessarily required. The Ninth Circuit has held the trial court "is not required to hold a Rule 104(a) hearing, but rather must merely make a determination as to the proposed expert's qualifications."[47]

Although the parameters of the *Daubert* test remain to be developed, state and federal courts generally are in agreement on certain interpretive principles.

1. Reliability

Under the *Daubert* test, the trial judge is first charged with assessing the "methodological" soundness of expert opinion. As stated by the Montana Supreme Court, "there must be a preliminary showing that the expert's opinion is premised on a reliable methodology."[48] The Ninth Circuit characterized the threshold task of the trial judge as no less than to determine "whether the experts' testimony reflects 'scientific knowledge,' whether their findings are 'derived by the scientific method,' and whether the expert work product amounts to 'good science.'"[49]

In tackling the reliability prong, the *Daubert* majority in dicta suggested a "non-exhaustive" list of factors for consideration. As subsequently adopted by the Montana Supreme Court—and thus rescued from further characterization as mere dictum—the "nonexclusive factors" include: (a) whether the theory or technique can be and has been tested; (b) whether the theory or technique has been subjected to peer review and publication; (c) what the known or potential rate of error is in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; and (d) whether the theory or technique has been generally accepted or rejected in the particular scientific field.[50]

The Montana Federal District Court and Ninth Circuit Court of Appeals likewise routinely cite the four-factor test suggested by the *Daubert* dictum.[51] Thus, the trial judge cannot go

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46. Hose v. Chicago Northwestern Transp. Co., 70 F.3d 968, 973 n.3 (8th Cir. 1995) (citations omitted).

47. Hopkins v. Dow Corning Corp., 33 F. 3d 1116, 1124 (9th Cir. 1994).

48. State v. Cline, 275 Mont. 46, 56, 909 P.2d 1171, 1177 (1996) (citing *Moore*, 268 Mont. at 42, 855 P.2d at 470-71).

49. Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1315 (citing *Daubert*, 509 U.S. at 593).

50. *See Cline*, 275 Mont. at 55-56, 909 P.2d at 1177; *Moore*, 268 Mont. at 41, 885 P.2d at 470-71 (citing *Daubert*, 509 U.S. at 593).

51. *See* Livingston v. Isuzu Motors, Ltd., 910 F. Supp. 1473 (D. Mont. 1995);

wrong by looking to the four factors at the outset. However, because the four-factor test is not a "definitive checklist," the trial judge may not rest after having combed through the itemized standards.[52] Rather, the inquiry must be "flexible."[53]

Moreover, the trial judge must "focus . . . solely on principles of methodology, not on the conclusions they generate."[54] This would seem to imply that if the methodology is unsound, then necessarily the conclusions are "discredited"; however, assuming the methodology passes muster, then the conclusions are admissible, no matter how suspect the conclusions may appear to the trial judge in his or her role as gatekeeper.[55] Perhaps for that reason, courts and commentators "have wrestled with the methodology/conclusion distinction,"[56] with some courts concluding the distinction "has only limited practical import."[57] In *Lust v. Merrell Dow*,[58] the Ninth Circuit seemed to indicate that the trial judge properly could scrutinize an expert's conclusions. The

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United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994). The Ninth Circuit has suggested an additional factor: "whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert*, 43 F.3d at 1317. As explained by the Ninth Circuit, "a scientist's normal workplace is the lab or in the field, not the courtroom or the lawyer's office." *Id.* at 1317. If the expert is not testifying based on research done independently of the litigation, "the party proffering it must come forward with other objective, verifiable evidence that the testimony is based on scientifically valid principles, such as a learned treatise, the policy statements of a professional association, a published article in a reputable scientific journal or the testimony of other experts." *Id.* The Fourth Circuit has identified yet another factor: whether standards or controls exist over the implementation of the methodology or reasoning. *See* Cavallo v. Star Enterprise, 100 F.3d 1150, 1158 (4th Cir. 1996). It is probably fair to conclude additional articulable standards will be forthcoming in the Courts. It seems equally clear that not all the enumerated factors will apply in each case. For example, the Ninth Circuit has stated the third and fourth factors identified in *Daubert*—testing and rate of error—do not apply "when the expert has not done original research, but rather has surveyed available literature and drawn conclusion that differ from those presented by the scientists who performed the original work." *Lust*, 89 F.3d at 597 (citing *Daubert*, 43 F.3d at 1317 n.4).

52. *Daubert*, 509 U.S. at 593.

53. Hart-Albin Co. v. McLees, Inc., 264 Mont. 1, 870 P.2d 51 (1994).

54. *Id.*; *see also Daubert*, 43 F. 3d at 1318 (stating "[b]ut the test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology").

55. *See* Claar v. Burlington N. R.R. Co., 29 F.3d 499, 501 (9th Cir. 1994). Put another way, a trial judge who rejects facially absurd but methodologically sound conclusions "oversteps" his or her authority, while the trial judge who excludes facially plausible but methodologically flawed opinion does not.

56. Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1399 (D. Or. 1996).

57. *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 746 (3d Cir. 1994).

58. 89 F.3d 594 (9th Cir. 1996).

court also held that a judge can exclude the opinion if it seems implausible or improbable, stating that "[w]hen a scientist claims to rely on a method practiced by most scientists, yet presents conclusions that are shared by no other scientist, the district court should be wary that the method has been faithfully applied" and "can exclude the opinion if the expert fails to identify and defend the reasons that his conclusions are anomalous."[59]

On the other hand, even a sound methodology is subject to being undermined if the data on which the expert relies are faulty. So, for example, where the expert has relied on data "so badly lacking" in substance his opinions could only amount to "guesswork," the opinion testimony was deemed excludable under Rule 703.[60] Of course, a complete failure to explain the methodology by which expert conclusions were reached warrants exclusion. In *Claar v. Burlington N. R.R. Co.*,[61] for example, the Ninth Circuit affirmed the decision of the United States District Court of Montana, excluding expert opinion that plaintiff's ailments were caused by exposure to chemicals in the workplace, where the experts "failed to explain the basis of" their opinions.[62] Because the methodology was not adequately set forth, the trial judge "could not make the findings required by Rule 702, and therefore properly refused to admit" the expert opinion into evidence.[63]

2. *Relevance*

Even assuming the expert's methodology is reliable, the trial judge's work is not done. In what has been characterized as the "fit" prong of the *Daubert* test, the trial judge next must determine whether the expert opinion "relates" to an "issue in the case."[64] As stated by the United States District Court of Montana, the "fit" test obligates the trial judge to determine "whether the reasoning and methodology can be applied to the facts in issue."[65] In that sense, a good "fit" seems to be one that is "helpful." As stated by the United States Supreme Court, "Rule 702's 'helpfulness' standard requires a valid scientific connection to a

59. *Lust*, 89 F.3d at 598.
60. *See* Allen v. Penn. Engineering Corp., 102 F.3d 194, 198-99 (5th Cir. 1997).
61. 29 F.3d 499 (9th Cir. 1994).
62. *Claar*, 29 F.3d at 502.
63. *Id.*
64. *Daubert*, 509 U.S. at 591. The *Daubert* majority "stressed the importance of a "fit" between the testimony and an issue in the case." *Daubert*, 43 F.3d at 1320.
65. *Livingston*, 910 F. Supp. at 1494 (citing *Daubert*, 509 U.S. at 593).

pertinent inquiry as a condition to admissibility."[66] And as characterized by the Ninth Circuit, in order to "fit" the expert's testimony must "logically advance a material aspect of the proposing party's case."[67]

Consequently, opinion testimony does not "logically advance" a proponent's case, and therefore cannot "fit," if the opinion cannot be stated "in terms of probability or certainty"; mere "possibility" is not enough.[68] However, this "certainty" principle is to be distinguished from evidentiary 'sufficiency'—while even a "reasonably certain" opinion may fall short of independently establishing an essential element of the proponent's case, the opinion should not be excludable on that basis alone.[69] As noted by the Second Circuit, the *Daubert* analysis addresses "admissibility" not "sufficiency"—the "sufficiency inquiry asks whether the collective weight of a litigant's case is adequate to present a jury question" and, accordingly, "lies further down the road" from a threshold admissibility analysis.[70] Thus, as the D.C. Circuit held, opinion testimony "does not warrant exclusion simply because it fails to establish" a point in issue "to a specified degree of probability," rather, it is enough that the opinions "could aid" the jury and are "sufficiently tied" to the facts.[71] Of course, admissible expert opinion may be insufficient to sustain a party's burden of proof, in which case the court may enter judgment as a matter of law under Rule 50 or summary judgment under Rule 56, as expressly noted by the *Daubert* majority.[72] Nevertheless, in apparent contravention of the admissibility/sufficiency distinction, some courts have excluded expert opinion on the basis the expert was unable to make a causal link with "certainty."[73]

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66. *Daubert*, 509 U.S. 591-92.

67. *Daubert*, 43 F.3d at 1315.

68. *See Daubert*, 43 F.3d at 1322; *Hall*, 947 F. Supp. at 1398.

69. In *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066-67 (9th Cir. 1996) the Ninth Circuit pointed out the distinction between admissibility and sufficiency, holding that a *Daubert* challenge goes solely to admissibility, and thus cannot be raised for the first time on appeal, where no timely challenge to admissibility was made.

70. *In re* Joint Eastern and Southern District Asbestos Litigation, 52 F.3d 1124, 1132 (2d Cir. 1995).

71. *See Ambrosini*, 101 F.3d at 135-36.

72. *See Daubert*, 509 U.S. at 596.

73. *See, e.g.*, Everett v. Georgia-Pacific Corp., 949 F. Supp. 856, 858-59 (S.D. Ga. 1996) (excluding testimony of expert who "admits he cannot state with any degree of medical certainty whether [plaintiff's] medical conditions were caused by exposure to chemical fumes"); United States v. Powers, 59 F.3d 1460, 1472 (4th Cir. 1995) (excluding expert testimony where "no evidence to link a non-proclivity for pedophilia with a non-proclivity for incest abuse").

The "fit" requirement goes primarily to relevance, but is not identical to the standard Rule 402 test of relevance.[74] In assessing whether the proffered expert testimony "will assist the trier of fact" in resolving an issue, the trial judge must look to the "governing substantive standard,"[75] whether it be causation, breach of duty, or some other substantive legal principle.[76] For example, in *United States v. Marsh*,[77] expert testimony on "dependent personality disorder" was excluded where "the jury was quite able to evaluate" defendant's position without the assistance of expert opinion.[78]

What if the expert's methodology is sound, and the opinion at least arguably would be "helpful" to the jury, but the expert has not applied the methodology to the facts with precision? Whether an error in "application" of a reliable methodology justifies exclusion is problematic. In *Moore*, the Montana Supreme Court adopted the reasoning of the Eighth Circuit, concluding that "[a]n alleged error in the application of a reliable methodology should provide the basis for exclusion of the opinion only if that error negates the basis for the reliability of the principle itself."[79] Conversely, in *In Re Paoli Railroad Yard PCB Litigation*[80], the Third Circuit concluded that, after *Daubert*, "we no longer think that the distinction between a methodology and its application is viable," on the basis that "any misapplication of a methodology that is significant enough to render it unreliable is likely to also be significant enough to skew the methodology."[81] The Eighth Circuit, in the decision followed by the Montana Supreme Court in *Moore*, similarly stated that a "failure to properly apply a scientific principle should provide the basis for exclusion of an expert opinion only if a 'reliable methodology was so altered . . . as to skew the methodology itself.'"[82] Thus, when confronted by an "application" error, as opposed to a "methodology" flaw, the trial court presumably must determine whether the

74. *Daubert*, 43 F.3d at 1321 n.17.

75. *Id.* at 1320.

76. *Hall*, 947 F. Supp. at 1397.

77. 26 F.3d 1496, 1502-03 (9th Cir. 1994)

78. *Marsh*, 26 F.3d at 1502-03.

79. *Moore*, 268 Mont. at 42, 885 P. 2d at 471 (quoting United States v. Martinez, 3 F.3d 1191, 1198 (8th Cir. 1993)).

80. 35 F.3d 717 (3d Cir. 1994).

81. 35 F.3d at 745.

82. United States v. Beasley, 102 F.3d 1440, 1448 (citing *Paoli R.R.*, 916 F.2d at 858); (8th Cir. 1996); *see also* United States v. Martinez, 3 F.3d 1191, 1198 (8th Cir. 1993) (citing *Paoli R.R.*, 916 F.2d at 858).

application gaffe is so egregious as to undermine an otherwise sound methodology. How the trial judge can do so without impermissibly scrutinizing the expert's "conclusions" is less easy to discern.[83]

Courts sometimes state that challenges to the particularized application of a given methodology go merely to the weight, not the admissibility of the evidence.[84] In *United States v. Hicks*,[85] for example, the Ninth Circuit rejected a claim that DNA testing is "especially susceptible to contamination" and thus unreliable, holding that the "impact of imperfectly conducted laboratory procedures" is better approached "as an issue going not to the admissibility, but to the weight of the DNA profiling evidence."[86] However, it is difficult to take such statements at face value. If the application error undermines the reliability of the opinion, then the objection most decidedly *does* go to admissibility, not merely to weight.[87] From this, it should be concluded that only those application errors insufficient to negate reliability go to weight, not admissibility.

3. *Special Dangers of Prejudice and Confusion*

Finally, the trial judge must also apply Rule of Evidence 403 to proposed expert testimony, and even relevant expert evidence must be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[88] Indeed, the *Daubert* majority noted that a judge exercises more control over experts than lay witnesses when weighing possible prejudice against probative value, due to the high risk that jurors will place too much emphasis on the testimony of an expert.[89] "Scientific expert testimony carries special dangers to the fact-finder because it can be

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83. *See* GRAHAM, FEDERAL RULES OF EVIDENCE 55 (1996) (stating that "the dividing line between conclusions and methodology is obviously fluid," as is "the distinction between methodology, conclusions and correct application of proper methodology . . . ").

84. *See Beasley*, 102 F.3d at 1448 (stating that in the Eighth Circuit, such objections go "to the weight of the testimony, not its admissibility").

85. 103 F.3d 837 (9th Cir. 1996).

86. 103 F.3d at 846 (citing United States v. Chischilly, 30 F.3d 1144, 1154 (9th Cir. 1994).

87. *See Beasley*, 102 F.3d at 1448. The Eighth Circuit found that alleged deficiencies in DNA testing were not shown to "so alter the PCR methodology as to make the test results inadmissible." *Id.*

88. *Daubert*, 509 U.S. at 595.

89. *Id.* at 596-97.

both powerful and quite misleading because of the difficulty in evaluating it," and thus the trial judge must "exclude proffered scientific evidence under Rules 702 and 403 unless he or she is convinced that it speaks clearly and directly to an issue in dispute in the case, and that it will not mislead the jury."[90] In that regard, the trial judge should consider alternatives to expert opinion. The Ninth Circuit has noted that, though expert testimony may be informative, the district court "is not required to admit expert testimony every time a party is able to make the threshold *Daubert* showing," but rather may exclude on basis the opinions would "waste time, confuse or not materially assist the trier of fact, or be better served through cross-examination or a comprehensive jury instruction."[91]

This is not to say the trial judge has carte blanche. To the contrary, the trial judge errs in "attempting to evaluate the credibility of opposing experts and the persuasiveness of competing scientific studies," as for example by "conflating the questions of the admissibility of expert testimony and the weight appropriately to be accorded such testimony by a fact-finder . . . ."[92] Some courts have noted that "once an expert has explained his or her methodology, and has withstood cross-examination or evidence suggesting that the methodology is not derived from scientific method, the expert's testimony, so long as it 'fits' an issue in the case, is admissible under rule 702 for the trier of fact to weigh."[93] The trial judge "must strike the appropriate balance between admitting reliable, helpful expert testimony and excluding misleading or confusing testimony to achieve the flexible approach outlined in *Daubert*."[94]

IV. SCHISM BETWEEN MONTANA STATE AND FEDERAL COURTS

A. Federal Court Applications of Daubert

The Ninth Circuit characterized the *Daubert* test imposed on state and federal trial court judges as an "uncomfortable

90. *Daubert*, 43 F.3d at 1321 n.17.

91. United States v. Rincon, 28 F.3d 921, 925 (9th Cir. 1994) (finding testimony by psychologist concerning possible defects in eyewitness testimony insufficiently reliable and a comprehensive jury instruction on eyewitness testimony is preferable); *see also Hicks*, 103 F.3d at 847.

92. *Ambrosini*, 101 F.3d at 134.

93. *Id.*

94. United States v. Cordoba, 104 F.3d 225, 228 (9th Cir. 1997) (quoting *Rincon*, 28 F.3d at 926).

task."[95] The fact that the *Daubert* majority proclaimed its "confiden[ce] that federal judges possess the capacity to undertake this review" may or may not ease the load.[96]

To all appearances, it now would seem the *Daubert* test holds sway in both state and federal courts in Montana, thus giving rise to jurisdictional uniformity. Unfortunately, however, the state and federal cases show signs of incipient schism: Does *Daubert* apply to all expert opinion, or merely to "scientific" opinion? If the latter, does *Daubert* apply to all scientific opinion, or only to "novel" scientific principles? Is *Barmeyer* still good law after *Daubert*, and if so, can *Barmeyer* and *Daubert* be reconciled?

1. What is Science?

As has been pointed out, Rule 702's reference to "scientific" knowledge is disjunctive of the Rule's reference to "technical, or other specialized knowledge."[97] The *Daubert* majority limited its discussion to the "scientific context," as opposed to the "technical, or other specialized knowledge" also referred to in Rule 702.[98] In *Daubert*, the Court stated, "the expert's testimony must be based on 'scientific . . . knowledge,' thus implying a 'grounding in the methods and procedures of science,'"[99] and further explained that "in order to qualify as 'scientific knowledge' an inference or assertion must be derived by the scientific method."[100] Thus, it seems the *Daubert* test applies only if the Court makes a threshold determination that the expert proposes to testify as a scientist on matters "scientific." In that sense, "[t]he distinction between scientific and nonscientific expert testimony is a critical one."[101] Unfortunately, "[t]here is no obvious clear demarcation between scientific knowledge and technical and other specialized

95. *Daubert*, 43 F.3d at 1317.

96. *Daubert*, 509 U.S. at 593.

97. Kopf v. Skyrm, 993 F.2d 374 (4th Cir. 1993).

98. *Daubert*, 509 U.S at 590 n.8; *see also* JACK B. WEINSTEIN ET AL., 3 WEINSTEIN'S EVIDENCE ¶ 702[03] at 702-46 n.10 (2d ed. 1991).

99. Hopkins v. Dow Corning Corp., 33 F.3d 1116, 1124 (9th Cir. 1994) (quoting *Daubert*, 509 U.S. at 590).

100. *Daubert*, 509 U.S. at 590; *see also* United States v. Rincon, 28 F.3d 921, 924-25 (9th Cir. 1994) (stating that the "first inquiry" under *Daubert* is "whether the proposed testimony . . . was on a scientific subject," and that "[i]n order to qualify as scientific knowledge, an inference or assertion must be derived from the scientific method."); United States v. Cordoba, 104 F.3d 225, 230 (9th Cir. 1997).

101. Berry v. City of Detroit, 25 F.3d 1342, 1349 (6th Cir. 1994).

knowledge."[102] For that matter, even under *Frye*, it was not always clear whether expert opinion was scientific in nature, and thus subject to the "general acceptance" test.[103]

"Social science" evidence presents but one example of the difficulties inherent in the science/nonscience distinction.[104] In *United States v. Rincon*,[105] the proposed expert, an experimental psychologist, proposed to testify regarding the reliability of eyewitness identification. The Ninth Circuit noted expert testimony is properly excluded where the expert fails to make a threshold showing his opinion relates to a scientific subject, and affirmed exclusion on the basis that "no showing has been made that the testimony relates to an area that is recognized as a science."[106] In *United States v. Amador-Galvan*,[107] however, the same court held expert testimony regarding unreliability of eyewitness identification was subject to *Daubert*. Conversely, in *United States v. Quinn*,[108] the Ninth Circuit concluded expert

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102. GRAHAM, *supra* note 84, at 43.

103. *See* United States v. Gillespie, 852 F.2d 475 (9th Cir. 1988) (stating that expert opinion based on play therapy with anatomically correct dolls held to be subject to *Frye* test). The science/nonscience distinction was vividly illustrated by one federal appellate court: if one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer could apply flight principles of universal application, and even if he had never seen a bumblebee in flight, could still be qualified to testify. On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness if a proper foundation were laid based on firsthand observation and experience. *See Berry*, 25 F.3d at 1349-52.

104. In his concurrence in part and dissent in part, Justice Rehnquist noted that "[c]ountless more questions will surely arise when hundreds of district court judges try to apply" the teachings of *Daubert*, including: "Does all of this dicta apply to an expert seeking to testify on the basis of 'technical or other specialized knowledge'—the other types of expert knowledge on which Rule 702 applies—or are the 'general observations' limited only to 'scientific knowledge?'" *Daubert*, 509 U.S at 594.

105. 984 F.2d 1003 (9th Cir. 1992). Interestingly, *Rincon* was remanded by the Supreme Court for reconsideration in light of *Daubert*, indicating at least inferentially the Supreme Court deemed its new test applicable to the eyewitness identification opinion at issue. *See* Rincon v. United States, 510 U.S. 801 (1993).

106. United States v. Rincon, 28 F.3d 921, 923 (9th Cir. 1994). Having concluded the opinion was not "scientific" at all, the Court went on to apply the *Daubert* "fit" test, ultimately concluding the opinion was inadmissible on that basis as well. Identical testimony subsequently was recognized by the Ninth Circuit as at least arguably "scientific." United States v. Hicks, 103 F.3d 837 (9th Cir. 1996). In *Hicks*, the lower court determined that, even assuming eyewitness opinion was "scientific," it would not materially assist the trier of fact, and so was excluded. Affirming, the Ninth Circuit appeared to recognize the expert opinion could be scientific in nature, but held the district court properly excluded the evidence. *See id.* at 847.

107. 9 F.3d 1414 (9th Cir. 1993).

108. 18 F.3d 1461 (9th Cir. 1994).

opinion on the use of "photogrammetry" to calculate the height of an individual in surveillance photographs was admissible where it "did not involve any novel or questionable scientific technique."[109] Further, in *United States v. Jones*,[110] the Ninth Circuit concluded that proposed expert testimony on voice identification was "novel," and that the expert had failed to demonstrate any "scientific basis" for the opinion, particularly given that the expert had no training on the subject, had written no articles, and had done no research. Accordingly, the Ninth Circuit held that under *Daubert*, the expert "failed to establish the scientific validity of" his opinion, and thus was properly excluded.[111]

In *United States v. Rouse*,[112] the Eighth Circuit applied *Daubert* and held that the defendant's expert psychologist should have been permitted to opine as to the "suggestibility" of techniques employed by investigating authorities, and whether the suggestive techniques "could have affected the memories" of the children who testified regarding alleged abuse.[113] On the other hand, expert testimony concerning the modus operandi of drug traffickers was held not subject to the *Daubert* test, on the basis it was based on "specialized knowledge, not scientific knowledge."[114] Thus, whether and to what extent a particular expert's testimony qualifies as "scientific" in nature, and thus is subject to *Daubert*, remains very much a moving target.

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109. *Id.* at 1464-65.

110. 24 F.3d 177 (9th Cir. 1994).

111. *Jones*, 24 F.3d at 1180.

112. 100 F.3d 1177 (9th Cir. 1994).

113. *Id.* at 573.

114. *Cordoba*, 104 F.3d at 230. The lack of agreement in the courts on the scope of *Daubert* is revealed by a survey of the case law. For example, in *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993) the Third Circuit cited *Daubert* in evaluating an economist's expert testimony. In *Hoult v. Hoult*, 57 F.3d 1, 4-5 (1st Cir. 1995). a *Daubert* analysis was applied with respect to expert opinion on the psychological dynamics and clinical profiles of victims of childhood sexual abuse and repressed memory of traumatic events. Testimony of a longshoreman with 29 years of experience who proposed to testify that a workplace was in an "extremely unusual and hazardous condition" was held improperly excluded by the Ninth Circuit, where the opinion was not based on scientific knowledge but rather on "knowledge, skill and experience." Thomas v. Newton Int'l Enterprises, 42 F.3d 1266, 1269 (9th Cir. 1994). In *United States v. 14.38 Acres of Land*, 80 F.3d 1074 (5th Cir. 1996) testimony of a real estate broker and real estate appraiser as to the effects of flooding on the value of real property was subjected to and found admissible under the *Daubert* test.

2. *Are Common Folk Experts Good Enough for Daubert?*

At least some courts and commentators conclude the *Daubert* two-part "reliability" and "relevance" test should apply to all expert testimony, whether "scientific" or not. The American College of Trial Lawyers, among others, has suggested extending *Daubert's* approach to expert testimony in general.[115] It has also been noted, "*Daubert* has led to increased scrutiny of expert testimony" in fields unrelated to the physical sciences, "such as economics and other social sciences."[116]

The Ninth Circuit has rejected attempts to extend *Daubert* to run-of-the-mill expert opinion, unequivocally holding that "*Daubert* applies only to the admissibility of scientific testimony."[117] As explained by the Ninth Circuit, the "special concerns" which "arise when evaluating the proffer of scientific testimony" simply are not present when "evaluating" other species of expert testimony.[118] At least some other Federal Circuit Courts have concurred.[119] For example, the Tenth Circuit has held that a *Daubert* analysis is "unwarranted in cases where expert testimony is based solely upon experience or training."[120] As stated by another federal court, "[w]here a witnesses' opinion is not the product of scientific methodology or systematic analysis, but rather a conclusion based on years of accumulated learning and insight, . . . reliability should be assessed without resort to these [*Daubert*] factors."[121] Conversely, at least some federal courts have looked to *Daubert* in evaluating admittedly "non-scientific" expert opinion. For example, in *In Re Aluminum Phosphide Antitrust Litigation*,[122] the testimony of a damages expert was excluded, the Court concluding:

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115. *See* American College of Trial Lawyers, *Standards and Procedures for Determining Admissibility of Expert Evidence after Daubert*, 157 F.R.D. 571 (Dec. 1994).

116. Paul K. Vickrey & Patrick F. Solon, Daubert *Tightens Scrutiny of Expert Witnesses in Business Tort Litigation* BUS. TORTS REP., Oct. 1996, at 274.

117. *Cordoba*, 104 F.3d at 230; *see also* Central Office Telephone, Inc. v. AT&T, No. 94-36116, 1997 WL 78442, at 83 (9th Cir. 1997) (stating that there is "no indication" *Daubert* "is meant to apply to all expert testimony").

118. *See Thomas*, 42 F.3d at 1270.

119. *See, e.g.*, Iacobelli Const., Inc. v. County of Monroe, 32 F.3d 19, 25 (2d Cir. 1994) (stating that expert testimony in construction contract dispute "does not present the kind of 'junk science' problem that *Daubert* meant to address."); Tamarin v. Adam Caterers, Inc., 13 F.3d 51, 53 (2d Cir. 1993) (finding that *Daubert* does not apply to testimony by accountant concerning payroll records).

120. Compton v. Subaru of America, Inc., 82 F.3d 1513, 1518 (10th Cir. 1996).

121. Liriano v. Hobart Corp., 949 F. Supp. 171, 178 (S.D.N.Y. 1996).

122. 893 F. Supp. 1497 (D. Kan. 1995).

> [W]hile each of the [*Daubert* factors] may not be relevant in determining the reliability of expert testimony on non-scientific or social science subjects, the court has no doubt that *Daubert* requires it to act as a gatekeeper, to determine whether [the expert's] testimony and reports are reliable and relevant under Rule 702.[123]

Likewise, in *Frymire-Brinati v. KPMG Peat Marwick*,[124] the Seventh Circuit held the District Court erred in admitting the testimony of plaintiff's expert accountant without first having vetted the opinion under the *Daubert* test.[125] The expert employed a discounted cash flow analysis in opining the defendants had contravened generally accepted auditing standards. Admission of this testimony was error, the Seventh Circuit concluded, in that the District Court failed to conduct the preliminary assessment required by Rule 104(a), and the expert "conceded he did not employ the methodology that experts in valuation find essential."[126]

On the other hand, the first task of the trial court is to "determine whether the expert's testimony pertains to scientific knowledge," which in turn "requires that the district court consider whether the testimony has been subjected to the scientific method" and to "rule out 'subjective belief or unsupported speculation.'"[127] So formulated, application of *Daubert* may yield the conclusion that the witness is not a scientist at all, or for that matter an expert, and thus his testimony must be excluded. A witness who proposed to explain how a rope came to break foundered on just such a conundrum, the Sixth Circuit determining the expert testimony "was not based upon any 'scientific, technical or other specialized knowledge,'" and that in the complete

123. *Id.* at 1506.

124. 2 F.3d 183 (7th Cir. 1993).

125. *Id.*

126. *Frymire-Brinati*, 2 F.3d at 186-87; *see also* United States v. Velasquez, 64 F.3d 844 (3d Cir. 1995) (finding the *Daubert* test "helpful" in assessing the testimony of an expert on handwriting analysis and finding that handwriting analysis qualifies as "scientific, technical or other specialized knowledge" which is "properly the subject of expert testimony," and also that the District Court erred in excluding testimony of an expert who would have testified the "field of handwriting analysis" is "not a valid field of scientific expertise because it lacks standards to guide experts"); *see also* City of Tuscaloosa v. Harcross Chemicals, Inc., 877 F. Supp. 1504 (N.D. Ala. 1995) (holding that the *Daubert* test was properly applied to expert opinion regarding a price-fixing conspiracy).

127. Porter v. Whitehall Lab, Inc., 9 F.3d 607, 614 (7th Cir. 1993) (quoting *Daubert*, 509 U.S. at 590).

absence of a valid scientific methodology as required by *Daubert*, the witness opinion "was not expert testimony under Rule 702."[128] The court concluded this non-scientific non-expert opinion was "precisely" the "kind of testimony that the Supreme Court in *Daubert* admonished federal courts to screen for scientific validity as a part of the court's 'gatekeeping function.'"[129]

For now, it probably is safe to conclude the *Daubert* test need not necessarily be consulted when a "non-scientific" expert's opinion testimony is called into question, although it likewise seems clear the Court in its discretion may at least consider the implications of *Daubert*, if it deems it helpful to do so.

B. Montana Supreme Court's Alternative Application of Daubert

1. What is Novel Science?

The Federal courts have struggled to delineate the scope of "scientific" expert opinion, as noted above. The Montana Supreme Court tackled the issue in *Hart-Albin Co. v. McLees, Inc.*,[130] which referenced *Daubert* in approving testimony of a "human factors" expert, finding, without extensive discussion, the expert "testified regarding scientific knowledge."[131] The human factors expert had a Ph.D. in industrial engineering, and had established a foundation that human factors is a "field of stud[y] that looks at human capabilities and limitations."[132] That a "human factors" expert was deemed to be a "scientist," while an experimental psychologist was not,[133] illustrates the difficulty of drawing a bright line between scientific and all other

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128. Cook v. American S.S. Co., 53 F.3d 733, 739 (6th Cir. 1995).

129. *Id.* at 139. Conversely, the fact that an expert's testimony was not scientific in nature has been deemed to support its admission. In *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1043 (2d Cir. 1995) the Second Circuit concluded that the opinions were based on "specialized knowledge," and thus rejected a claim the opinion was excludable because it was not "scientific" in nature, while further concluding the testimony "easily qualifie[d] for admission under *Daubert*."

As recognized by the courts, "[t]he applicability of *Daubert*'s analysis outside the context of novel, scientific evidence is the subject of debate." Tassin v. Sears, Roebuck & Co., 946 F. Supp. 1241, 1245 (M.D. La. 1996) (holding that *Daubert* was confined to evaluation of scientific testimony); *see also Compton*, 82 F.3d at 1517-19 (holding that *Daubert* factors apply only to unique, untested or controversial methodologies); *see also* Cummins v. Lyle Industries, 93 F.3d 362, 367-68 n.2 (7th Cir. 1996) (applying *Daubert* analysis to technical issues of product design).

130. 264 Mont. 1, 870 P.2d 51 (1994).

131. *Id.*

132. *Hart-Albin*, 264 Mont. at 6, 870 P.2d at 56.

133. *See* United States v. Rincon, 984 F.2d 1003 (9th Cir. 1992).

expert opinion.

To complicate matters further, the Montana Supreme Court appears to have layered in an additional test, by interpreting *Daubert* to apply only to "novel" scientific evidence. While this distinction was merely hinted at in *Weeks*, any doubt was laid to rest in *Cline*, wherein the Court expressly stated: "Certainly all scientific evidence is not subject to the *Daubert* standard and the *Daubert* test should only be used to determine the admissibility of novel scientific evidence."[134]

That the Montana Supreme Court might have interpreted *Daubert* as applying only to "novel" science is not difficult to understand. The *Frye* court was concerned with science at the cutting edge, that is, the point at which "a scientific principle or discovery crosses the line between the experimental and demonstrable stages . . . ."[135] As colorfully explained in *Frye*, somewhere in that "twilight zone" the "evidential force of a principle must be recognized." Unfortunately, that line is "difficult to define."[136] Under *Frye*, a particular scientific principle crossed the line from "twilight zone" to legal admissibility precisely at that point at which the scientific community bestowed its blessing by consensus. Given that *Frye* parsed distinctions between "novel" and "generally accepted" science, and that the *Daubert* majority expressly undertook to administer last rites to *Frye*, it perhaps was not illogical to conclude that the *Daubert* majority intended merely to address admissibility of "novel" science, and did not intend its ruling to apply to science which clearly had crossed the threshold into general acceptability.

However, the distinction drawn in *Cline* between "novel" and all other scientific opinion has not been observed in the federal courts. The *Daubert* majority expressly stated its new test was addressed to "any and all scientific testimony or evidence."[137] As the Court explained, "Although the *Frye* decision itself focussed exclusively on 'novel' scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence."[138] The Ninth Circuit in post-*Daubert*

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134. State v. Cline, 275 Mont. 46, 909 P.2d 1171 (1996).

135. United States v. Frye, 293 F. 1013, 1014 (D.C. Cir. 1923).

136. The problem has not gotten any easier in the seventy years since *Frye* was decided, as the *Daubert* majority recognized.

137. *Daubert*, 509 U.S. at 590 (emphasis added).

138. *Id.*,

> Of course, well established propositions are likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific

decisions has stated the *Daubert* test applies to all scientific opinion evidence, whether novel or not. In *Claar v. Burlington Northern Railroad Co.*, on appeal from the United States District Court of Montana,[139] the Ninth Circuit expressly noted that the requirements of *Daubert* apply to "all proffered expert testimony—not just testimony based on novel scientific methods or evidence."[140] Other federal courts have applied what might be characterized as a sliding scale—the more novel the science, the more likely *Daubert* will be helpful. As explained by one court: "While *Daubert*'s principles have valuable application in determining the admissibility of controversial and novel scientific hypotheses, they have less use in fields like design engineering where 'general acceptance' is the norm, not the exception."[141]

2. *If Frye is Dead, Long Live Barmeyer?*

The *Frye* doctrine arose in a criminal law context, and most often was applied in criminal law cases.[142] The *Daubert* test, in contrast, arose in a civil litigation context, but has come routinely to be applied in the criminal law context by federal courts. The Montana Supreme Court expressly adopted *Daubert* in *Moore*, a criminal law case. While the Court referenced *Daubert* in *Hart-Albin*, a civil case, the doctrine has not otherwise been explicitly adopted for use in the civil law context, although it probably is safe to conclude the Montana Supreme Court will apply *Daubert* to all civil litigation.

As noted above, *Barmeyer* put an end to the *Frye* doctrine in Montana. Subsequently *Daubert* put an end to *Frye* in federal courts. In addition, *Daubert* set up a new standard which did not exist at the time of *Barmeyer*. It might be expected that, having

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law, such as the laws of thermodynamics, properly are subject to judicial notice under Fed. R. Evid. 201.

Id.

139. 29 F.3d 499, 501 n.2 (9th Cir. 1994).

140. *Id.*; *see also* Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1066 (9th Cir. 1996) (finding that "*Daubert* applies a test for admissibility of scientific evidence").

141. Officer v. Teledyne Republic/Sprague, 870 F. Supp. 408, 410 (D. Mass. 1994).

142. According to a 1993 survey, sixty-four of the sixty-seven reported federal appellate decisions analyzing the admissibility of scientific evidence under *Frye* were criminal cases, while not a single case decided by the federal appellate courts prior to 1975 applied *Frye* in a civil case of any kind, and as of April 1993 only three such decisions had been reported, two of which were decided in 1991. *See* Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AMER. U.L. REV. 1637, 1693-95 (1993); *see also Graham, supra* note 84, at 59 n.30.

adopted *Daubert*, the Montana Supreme Court would discard the once useful but no longer particularly germane *Barmeyer* decision. Interestingly, this has not been the case. Even after having embraced *Daubert*, the Montana Supreme Court continues to pointedly cite *Barmeyer*. As stated in *Cline*, "[w]hen we adopted the *Daubert* test in *Moore*, we specifically noted the continuing vitality of *Barmeyer* as that case pertained to the scientific evidence."[143] Further, in *Moore* the Court took pains to point out that "the guidelines set forth in *Daubert* are consistent with our previous holding in *Barmeyer* concerning the admission of expert testimony of novel scientific evidence."[144]

Given that the Montana Supreme Court continues to cite both *Daubert* and *Barmeyer*, a trial court judge might be tempted to conclude that a particular proffer of scientific opinion is subject to not one but two tests, and that, where a particular scientific opinion does not pass muster under *Daubert*, it may still come in under *Barmeyer*. Thus, for example, a trial judge might conclude that the expert's opinion has not been tested, is neither subject to peer review nor publication, is subject to a high potential rate of error, and is not generally accepted in the scientific community. Thus, this judge may conclude that this opinion is patently inadmissible under *Daubert*. However, this same judge might nonetheless also conclude that, under *Barmeyer*, these infirmities go only to the weight of the opinion, and, may further assume that potential prejudice could be alleviated by vigorous cross examination. As a result, this judge might conclude that the testimony should be admitted.

V. TOWARD RECONCILIATION IN MONTANA STATE AND FEDERAL COURTS

The post-*Daubert* decisions of the Montana state and federal courts appear to create at least some potential for an untenable rift between state and federal rules of evidence. Under *Cline*, the Montana State Court judge presumably must make a threshold determination of novelty in order to determine whether *Daubert* even applies. A federal court judge applying federal rules of evidence is not so required. A litigant in Montana state court presumably may rely on *Barmeyer* in the alternative to *Daubert*. A federal court litigant could not do the same. To eliminate such actual or apparent inconsistencies, a uniform framework of anal-

143. State v. Cline, 275 Mont. 45, 56 909 P.2d 1171, 1177 (1996).
144. State v. Moore, 269 Mont. 20, 41, 885 P.2d 457, 471 (1994).

ysis is next suggested.

A. Daubert is Not Limited to Novel Science

As noted above, in *Cline*, the Montana Supreme Court drew a distinction between "novel" science and all other science. The distinction appears to be untenable. To say a particular scientific principle is "novel" enunciates a conclusion, not a framework for analysis. By definition, a principle is novel only if it is new, not widely accepted, at the "cutting edge," and thus presumably subject to the evils of unconventional opinion, such as lack of verifiability, peer review, adequate testing, and want of blessing in the scientific community. The *Daubert* factors are designed to assist the trial judge in determining whether a particular scientific principle is generally accepted, verifiable, subject to a high rate of error and so forth. To ask the trial court to determine whether the science is "novel" before applying *Daubert* is to deprive him of the very framework of analysis *Daubert* was meant to provide. As stated by the Seventh Circuit's Judge Posner, under *Daubert* "a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist."[145] For that matter, a Rule 104(a) preliminary hearing is uniquely well suited to application of the *Daubert* test. Where the admissibility of expert testimony is in issue, and where it is not clear the testimony is scientific, much less novel, the trial judge should be given opportunity to assess the testimony in a Rule 104(a) context, drawing upon the *Daubert* standards. While most sensible trial judges presumably would cut through the verbiage and apply the right factors to reach the correct result, an artificial novel/non-novel dichotomy can only serve to invite confusion and error.

B. Of Barmeyer and Frye—One Test, Not Two

As noted above, the Montana Supreme Court continues to cite both *Barmeyer* and *Daubert*, pointedly stating *Barmeyer* "retains its vitality." The *Barmeyer* principle on which the Montana Supreme Court continues to rely is that "it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-

145. Rosen v. CIBA-Geigy Corp., 78 F.3d 316, 318 (7th Cir. 1996).

examination and refutation."[146]

After *Daubert* it is difficult to discern how *Barmeyer* could possibly "retain its vitality." Under *Daubert*, scientific evidence simply is *not* admitted "in the same manner as other expert testimony." Rather, scientific evidence after *Daubert* is subject to a two-prong, multi-factor test, which is *not* applied to other, non-scientific forms of expert opinion. In that respect, federal courts have noted that the "goal of *Daubert*" is to subject scientific opinion testimony to a "more rigorous" standard of review.[147] The notion that scientific evidence is treated "the same as" other forms of expert opinion after *Daubert* thus is not merely misleading, it is analytically false.[148]

In this, a page of history may be worth a volume of logic. In *Barmeyer* the Montana Supreme Court, after expressing its disenchantment with the *Frye* test, adopted the "philosophy" articulated by the Fourth Circuit in *United States v. Baller*.[149] It is from *Baller* that the language from *Barmeyer* quoted above is derived. While *Barmeyer* apparently retains life in Montana state courts, it seems doubtful the *Baller* decision on which it was based still has a pulse. Since *Daubert*, the *Baller* decision has been cited as having significance only to the "general acceptance" prong of the *Daubert* multi-factor test.[150] As noted above, even under *Daubert*, the *Frye* test retains one lingering vestige of life, in the form of the fourth prong of the *Daubert* test: "whether the theory or technique has been generally accepted or rejected in the particular scientific field."[151] In that regard, *Frye* has been reincarnated thusly: "the methodology and reasoning used by an expert witness should occupy a 'significant place in the discourse of experts in the field.'"[152] As characterized by the Ninth Circuit, "in certain circumstances it may be sufficient if a minority in the scientific community accepts the methods employed, but only if the proponent demonstrates in some 'objectively verifiable way that the expert has both chose a reliable scientific method and followed it faithfully.'"[153]

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146. *Barmeyer*, 202 Mont. 185, 193, 657 P.2d 594, 598.

147. *See* Allen v. Pennsylvania Engineering Corp., 102 F.3d 194, 198 (5th Cir. 1996).

148. *See* State v. Weeks, 270 Mont. 63, 891 P.2d 477, 491 (1995).

149. 519 F.2d 463 (4th Cir. 1975).

150. *See, e.g.*, United States v. Bonds, 12 F.3d 540, 561 (6th Cir. 1993).

151. *Cline*, 275 Mont. at 56, 909 P.2d at 1177.

152. Ballinger v. Atkins, 947 F. Supp. 925, 929 (E.D. Va. 1996) (citing Cavallo Star Enter., 100 F.3d 1150, 1159 (4th Cir. 1996)).

153. Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1397 (D. Or. 1996)

The basic sentiment expressed in *Barmeyer*—that opportunity for vigorous cross-examination is one safeguard against undue jury reliance on "junk" science—undoubtedly still holds true after *Daubert*. What is not true, however, is that this basic principle somehow can be utilized as a substitute for the more exacting *Daubert* test, as the *Daubert* majority seemed to expressly recognize. In addressing concerns of the parties and amici, the *Daubert* majority pointed out that abandonment of *Frye* would not open the doors to "pseudoscientific" opinion.[154] "Conventional devices" are available to prevent a "free-for-all in which befuddled juries are confounded by absurd and irrational" expert opinion, including "[v]igorous cross examination, presentation of contrary evidence, and careful instruction on burden of proof."[155] These safeguards are in addition to, not an alternative of, the *Daubert* test. However, as the Supreme Court made clear: "These conventional devices, rather than wholesale exclusion under an uncompromising 'general acceptance' test, are the appropriate safeguards *where the basis of scientific testimony meets the standards of Rule 702.*"[156]

For the foregoing reasons, this article respectfully submits that continuing reliance on *Barmeyer* serves only to cloud the issue. It should no longer be the case that scientific opinion that fails the *Daubert* test may be admitted if adequate opportunities for cross-examination and refutation are afforded. If *Daubert* is to be the test in Montana—as the Montana Supreme Court has said it will be—then *Barmeyer* can no longer retain its vitality, except in a greatly restricted sense.

C. The Ladder of Admissibility Post-Daubert

Based upon existing case law, when confronted by a particular putative expert, the trial judge potentially may be called upon to resolve at least the following issues:

(1) is the expert qualified;[157]

(quoting *Daubert*, 43 F.3d at 1319 n.11).

154. *Daubert*, 509 U.S. at 591.

155. *Id.* at 591.

156. *Id.* (emphasis added).

157. "Implicit in Rule 702 is the requirement that before a District Court allows a witness designated as an expert to express an opinion, some foundation must be laid to show that the expert has special training or education and adequate knowledge on which to base an opinion." Cottrel v. Burlington N. R.R. Co., 261 Mont. 296, 301, 863 P.2d 381, 384 (1994). When called as an expert, a witness must first show his qualifications to speak with authority, and may then testify only as to those

(2) is the opinion derived from a proper factual foundation;[158]

(3) is the subject matter amenable to expert opinion;[159]

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matters on which he has peculiar knowledge. *See* Moffett v. Bozeman Canning Co., 95 Mont. 347, 353, 26 P.2d 973, 975 (1933). The party presenting a witness bears the burden of establishing, to the satisfaction of the trial court, that the witness possesses the requisite knowledge, skill, experience, training and education to testify as to the subject in issue. *See* O'Leyar v. Callendar, 255 Mont. 277, 843 P.2d 304 (1992); *see also* Glover v. Ballhagen, 232 Mont. 427, 756 P.2d 1166 (1988). An expert lacking in expertise likely will not find his opinions entertained. So, for example, a board certified ear, nose and throat specialist could not qualify as an expert as to the standard of care of an oral surgeon. *See* Llera v. Wisner, 171 Mont. 254, 264, 557 P.2d 805, 811 (1976) (holding that a licensed chiropractor was not qualified to give his opinion on injured worker's impairment rating based on guidelines formulated for use by licensed medical physicians); *see also* Wacker v. Park Rural Electric Co-op., 239 Mont. 500, 501-02, 783 P.2d 360, 361 (1989) (holding that a plaintiff was not qualified to give opinion testimony as to cause of his own physical illness); *see also* Harrington v. Holiday Rambler Corp., 176 Mont. 37, 43, 575 P.2d 578, 581 (1978).

158. An expert may base an opinion on facts or data perceived by or made known to him at or before the hearing. *See* MONT. R. EVID. 703. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. *See, e.g.,* Krueger v. General Motors Corp., 240 Mont. 266, 783 P.2d 1340 (1989); *In Re* Marriage of Mitchell, 248 Mont. 105, 809 P.2d 582 (1991). For example, expert opinion may be based upon hearsay. *See In re* Matter of J.M., 217 Mont. 300, 704 P.2d 1037 (1985). A medical expert may testify concerning health records made by other health professionals if he has relied on them in forming opinions or inferences. *See* Diacon v. Farmers Ins. Exchange, 233 Mont. 515, 761 P.2d 401 (1988). In *Jangula v. United States Rubber*, 47 Mont. 98, 98, 410 P.2d 462, 466-67 (1966) expert opinion was excluded where the Court found that the "facts" referred to were "contrary to" what the expert had "found to be the fact," so that the hypothetical question and answer were sheer speculation and not based upon evidence before the court. In *Cottrell v. Burlington Northern R.R. Co.*, 261 Mont. 296, 863 P.2d 381 (1993) the Montana Supreme Court affirmed the trial court's exclusion of expert opinion, due to lack of factual foundation for the opinion, where the medical expert, who proposed to express an opinion apportioning plaintiff's symptoms and disability between two injuries which occurred nine years apart had never examined the plaintiff, had never met or talked with plaintiff, had not read plaintiff's deposition, had never talked with plaintiff's treating physicians or read their depositions, was unaware of the type of work done by plaintiff or the physical exertion plaintiff was capable of performing, knew nothing about plaintiff's job description, and, most significantly, was "totally unfamiliar with the traumatic event" which plaintiff alleged had caused his injury. At the other end of the spectrum, in *Montana Rail Link v. Byard*, 260 Mont. 331, 860 P.2d 121 (1993) the court held that expert in "communications and clinical psychology" properly relied on briefs of the parties, interviews of the plaintiff, an agreed statement of facts, and the contentions of the parties in offering opinion testimony regarding "interpersonal communications, particularly communication styles and how they affect men and women in the work setting." Because the materials reviewed were the "best available resources" and "would be used in the field of interpersonal communications" the expert was justified in relying on them.

159. A matter generally qualifies where it is "not within the range of ordinary training or intelligence," *Kelly v. John R. Daily Co.*, 56 Mont. 63, 181 P. 326 (1919),

(4) does the expert hold his or her opinions with sufficient certainty;[160]

(5) assuming the expert purports to testify based on scientific knowledge: (a) is the opinion truly "scientific," (b) is the expert's methodology sound, (c) has the expert applied the methodology to the facts with sufficient precision;[161] and in any case:

(6) would the opinion be helpful to the fact-finder in resolving an actual issue in the case, i.e., is there a "fit";[162] and

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or is "too complex to be really grasped by the average mind," *Wibaux Realty Co. v. N. Pac. Ry.*, 101 Mont. 126, 54 P.2d 1175 (1933), or is "sufficiently beyond common experience." Wagner v. Cutler, 232 Mont. 332, 757 P.2d 779, 783 (1988); *see also Vandalia Ranch* 221 Mont. at 253, 718 P.2d at 650. In a particularly colorful turn of phrase, the Montana Supreme Court has stated expert witness testimony is allowed if the evidence or fact in issue is "beyond the ken" of the ordinary juror. *See* Smith v. Roosevelt County, 242 Mont. 27, 788 P.2d 895 (1990). While litigators may disagree as to the scope of the average juror's "ken," it seems to be understood this means something "beyond common experience," such that an expert's "superior knowledge and experience enable him to deduce effects from cause and draw a conclusion which the trier of facts could not draw because of lack of such knowledge." *Vandalia Ranch*, 221 Mont. at 253, 718 P.2d at 653. Thus, expert evidence long has been permitted regarding "scientific" or "technical" matters, for the common sense reason that such testimony is needed to help jurors understand and determine the facts of the case. *Smith*, 242 Mont. at 27, 788 P.2d at 899. Finally:

> The necessity for opinion evidence only exists where the facts in controversy are incapable of being detailed and described so as to give the jury an intelligible understanding concerning them; but when the facts are such as can be detailed or described, and the jurors are capable to understand and draw a correct conclusion from them without such opinion evidence, the necessity for it does not exist.

Demarais v. Johnson, 90 Mont. 366, 371, 3 P.2d 283, 285 (1931).

160. In *Stordahl v. Rush Implement Co.*, 148 Mont. 13, 417 P.2d 95 (1966) the plaintiff claimed that a single traumatic injury was the cause of cancer and the plaintiff's medical expert testified that the "most possible and probable cause" of the Plaintiff's cancer was the trauma. The Montana Supreme Court held that such expert opinion was insufficient as a matter of law. *Id.* In *Young v. Horton*, 259 Mont. 34, 855 P.2d 502 (1993) however, the court held that expert medical testimony which was not expressed in the form of a conclusion to a "reasonable degree of medical certainty" was nevertheless admissible, where the testimony was not given in the form of an opinion, but rather was based on the experts' own experience. The Court found that under Rule 702 an expert may testify in the form of "an opinion or otherwise," and that the proffered testimony was acceptable in form under the rule. *Id.* In *Farris v. Clark*, 58 Mont. 33, 487 P.2d 1307 (1971) the medical expert testified that it was "possible" or "probable" that a ruptured disk had been caused by a rear-end collision and the Montana Supreme Court reversed a jury award for the plaintiff, finding that the expert testimony was too speculative to support the award.

161. *See* text and notes discussed *supra* at 46-62.

162. State v. Stringer, 271 Mont. 367, 377, 897 P.2d 1063, 1069 (1995) (holding that while expert testimony on "battered spouse syndrome" is generally admissible in Montana, the evidence should not have been admitted on the facts of the case, since the State failed to lay an appropriate foundation that the complainant was a battered spouse).

(7) does the relevance of the opinion outweigh its prejudicial effect?[163]

The trial judge should not hesitate to utilize the preliminary hearing provisions of Rule 104(a) to address expert opinion admissibility issues. The 104(a) hearing most often is employed when a *Daubert* challenge is presented, although the mechanism need not be so limited. Given the increased rigor of the *Daubert* test, litigants and judges would be well-advised to plan a Rule 104(a) hearing well in advance of trial in any case where complex expert testimony is anticipated.

VI. CONCLUSION

Given the sheer complexity of the task, variations in interpretation by and among the Montana state and federal courts can only serve to unnecessarily complicate the lives of trial judges, litigants and litigators. If such inconsistencies are permitted to proliferate, a particular party espousing a particularly controversial scientific principle might be tempted to forum shop, in hopes of achieving a better result under one or the other system. To avoid such results, the Montana Supreme Court should follow the federal courts in making clear the two-part *Daubert* test is not limited to "novel" science. Continuing reliance on *Barmeyer* should not be made. This article submits that application on the *Daubert* test to all expert opinion is the better course, although for now courts have not reached consensus on the issue, and the Ninth Circuit has stated to the contrary. To the extent the Montana state and federal courts are uniform in their interpretation of Rule 702 and *Daubert*, the state's trial judges will be able to better and more efficiently administer justice in a particular casey

163. *See* text and notes discussed *supra* at 94-100.